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regard to the terms of the decree in this case we think that the ruling in *Nilmadhub Chuckerbutty* v. *Ramsody Ghose* (1) relied upon by the Courts below, is not applicable. Here the decree distinctly provides that, upon failure to pay any one instalment, the agreement for payment by instalments shall be cancelled and the decree-holder shall thereupon realize the whole decree, and shall also obtain from the judgment-debtor interest at a certain specified rate. The decree-holder in the present instance does not profess to have waived his claim, for he seeks to realize the whole decree, and he also claims interest at the rate stipulated. He therefore seeks to take advantage of the provisions of the decree. He must, we think, be also bound by any disability which may arise upon a proper construction of that decree. Upon the terms of the decree we think that he had no option to waive his right to execute it for the whole amount; and, having neglected to take advantage of the privilege given in that decree, he is now too late to realize anything.

We accordingly allow this appeal, set aside the orders of the Courts below, and dismiss the application, with costs in this Court and the lower Courts.

P. O'K. *Appeal allowed.*

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

DWARKA NATH RAI AND OTHERS (PLAINTIFFS) *v.* KALI CHUNDER RAI AND OTHERS (DEFENDANTS).*

1886 *February* 12.

Co-sharers—Notice to Quit—Co-sharers, Suit by—Withdrawal of one co-sharer from the suit—Ejectment.

Where several co-sharers have served a joint notice to quit, upon which notice they jointly institute a suit for the recovery of the land, the fact that one of the plaintiffs withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land.

* Appeal from Appellate Decree No. 749 of 1885, against the decree of Baboo Mati Lal Sarkar, Subordinate Judge of Dacca, dated the 26th of January 1885, reversing the decree of Baboo Ram Chunder Dhur, Second Munsiff of Manickgunge, dated the 22nd of December 1883.

(1) I. L. R., 9 Calc., 857

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THE judgment appealed from was as follows:—

"These are two appeals Nos. 46, 50, from one and the same case. Plaintiff sued the defendants Nos. 1 to 5 to eject them from the land in dispute after giving them notice of ejectment. During the hearing of the case, one of the plaintiffs, *viz.*, Saroda Sundari, withdrew from the suit, and the first Court, therefore, dismissed the suit for ejectment on the ground that her co-sharers alone, *viz.*, the remaining plaintiffs, could not maintain the suit.

"These remaining plaintiffs make appeal No. 46, and contend among other things: (1), that Saroda Sundari after having jointly with them served notice of ejectment and brought the suit could not withdraw from it, and that at any rate defendants Nos. 1 to 5's tenancy terminated on the expiration of the notice, and her withdrawal, therefore, could not protect the defendants; and (2), that the tenant-defendants having denied in their written statement the plaintiffs' title as landlords, they should have been treated as trespassers, and a decree should have been given to the remaining plaintiffs for possession of their share in the land.

"The tenant-defendants made appeal No. 50, and they contend among other things that the first Court, finding that the remaining plaintiffs alone were not entitled to eject, should have simply dismissed the suit, and should not have recorded its findings on the other points which arose in the case.

"On the first point in appeal No. 46, the ruling in *Mohamaya Chowdhrani* v. *Durga Churn Shaha* (1) shows that as Saroda Sundari did not ask for permission to bring a fresh suit, the first Court could allow her to withdraw from the suit. The appellants in No. 46 then refer to s. 111 of the Transfer of Property Act, and contend that the defendants Nos. 1 to 5's tenancy terminated on the expiration of the notice of ejectment, and that to hold that the suit could not be maintained on account of Saroda Sundari's withdrawal, would be virtually to enable her to re-introduce tenants on ijmali land without the consent of her co-sharer. But reading s. 113 of the same Act I hold that, as the notice was expressly waived by the plaintiff Saroda Sundari, it became void *ab initio*, as respects her share, so that the

(1)—9 C. L. R., 332.

case stood after withdrawal as if there had been no notice given on her part. If the land were *bhiti*, and its tenants were given notice to quit after 11 years' occupation, and then the notice were waived, and the tenant allowed to occupy for one year more, would clause (*h*), s. 111 of the Transfer of Property Act prevent the tenant from acquiring a right of occupancy? I think under s. 113 of the Act it would not. In this view of the case, I think the first point should be decided against the appellants in No. 46, as they alone could not have sued to eject.

"On the second point in appeal No. 46, I think plaintiffs can, after the tenant-defendants have denied the relation of landlord and tenant, treat the defendants as trespassers and bring a suit for possession of their share. But I doubt if a decree for possession on that ground can be given in the present suit. Here the repudiation was after the institution of the suit. I have not been shown any authority giving a decree on a cause of action accruing after the institution of the suit. Two rulings have been cited by the appellants—*Shumsher Ali* v. *Doya Bibi* (1), and *Sutyabhama Dssee* v. *Krishna Chunder Chatterjee* (2). But it appears to me on reading the full report that in each of these cases there was a repudiation on the part of the tenant before the cases were brought, and as the tenants insisted on their repudiation of the plaintiff's title the High Court decided against them. Neither of these two cases shows that a decree was given simply because during its progress the tenants repudiated the plaintiff's title. I therefore find the second point in No. 46 also against the appellants in that case."

On the tenants' appeal the Subordinate Judge reversed the findings of the Munsiff in the authority of *Barhamdeo Narain Sing* v. *Mackenzie* (3)."

The plaintiffs appealed to the High Court.

Baboo *Durga Mohun Das*, for the appellants.

Baboo *Hari Mohun Chackrabati* and Baboo *Kuloda Kinkar Rai*, for the respondents.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

(1) 8 C. L. R., 150.

(2) I. L. R., 6 Calc., 55.

(3) I. L. R., 10 Calc., 1095.

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DWARKA NATH RAI v. KALI CHUNDER RAI.

This is a suit originally brought by five persons claiming as proprietors of the land held by the defendants, to eject them on service of notice.

In the course of the proceedings in the first Court, one of the defendants, Saroda Sundari Gupta, obtained leave to withdraw from the appeal, and was accordingly made a defendant by the other plaintiffs.

The Subordinate Judge in appeal has found that, although notice was served by all the landlords, still, inasmuch as one of them was not a plaintiff in the present suit, it must fail. The authorities cited to us—*Radha Proshad Wasti* v. *Esuf* (1), and *Reasut Hossein* v. *Chorwar Sing* (2)—do not support this view of the law. It seems rather that the plaintiffs now on the record are entitled to ask for a decree to get possession as against the defendants of their share of the estate provided that they succeed in other respects. As has been pointed out already by this Court, if such a suit were not possible, it would be in the power of the proprietor of a very small portion of a property to prevent the other proprietors from ever asking for their rights. We think, therefore, that the suit should proceed.

P. O'K. *Appeal allowed.*

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

1886 *February* 11.

MOSHAULLAH (DEFENDANT) *v.* AHMEDULLAH (PLAINTIFF.)*

Appeal—Ex parte Order—Admission of Appeal—Limitation Act, 1877, *s.* 5—*Sufficient cause.*

An *ex parte* order admitting an appeal is subject to reconsideration on the hearing of the appeal.

Poverty is not sufficient cause, within the meaning of s. 5 of the Limitation Act, Act XV of 1877, for admitting an appeal after the ordinary period of limitation prescribed therefor has expired.

THIS was a suit to recover from the defendant the sum of Rs. 7,000, and for a declaration of lien over certain properties, situated in the 24-Pergunnahs, belonging to the defendant, a list of which was annexed to the plaint. The Court of first instance

* Appeal from Original Decree No. 6 of 1885, against the decree of Baboo Nuffur Chunder Bhutto, First Subordinate Judge of 24-Pergunnahs, dated the 27th of February 1884.

(1) I. L. R., 7 Calc., 414. (2) I. L. R., 7 Calc., 470.